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No. 83-138

In the Supreme Court of the United States

October Term, 1983

GOLD CROSS AMBULANCE CO., INC., et al.,
Petitioners,

vs.

CITY OF KANSAS CITY, MISSOURI, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Metropolitan Ambulance Services Trust (MAST), City of Kansas City, Missouri, Ambulance Services, Inc., Fourth Party, Inc., and Jack Stout[1] respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari filed by petitioners Gold Cross Ambulance Co., Inc. and Transfer and Standby Services, Inc. Petitioners seek review of the decision of the United States Court of Appeals for the Eighth Circuit that respondents' actions in creating a single-provider ambulance system for the City of Kansas City, Missouri, are exempt from antitrust scrutiny by virtue of the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny.

1. None of the respondents have any parents, subsidiaries or affiliates. MAST purchased the stock of Ambulance Services, Inc. in 1981, and ASI ceased to be an active corporation in July 1982. Although petitioners have identified as respondents Hadley Reimal, Eugene Desaulniers, June Desaulniers and Lawrence Hughes, these persons are not properly before this Court, as their motion for summary judgment was denied by the District Court, and this denial was not appealed to the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, reported at 705 F.2d 1005 (1983), appears in Appendix A to petitioners' Petition, at page A1. The opinion of the United States District Court for the Western District of Missouri, reported at 538 F. Supp. 956 (1982), is set forth at page A27 of the Petition.

STATEMENT OF THE CASE

This case arises out of the efforts by the City of Kansas City to provide high quality, economically efficient, advanced prehospital emergency medical care for the people of Kansas City. Respondent MAST is a not-for-profit public trust created by the City and charged with overseeing the City's ambulance system. Respondents Stout and Fourth Party are consultants who played a part in Kansas City's decision to deliver ambulance service to its residents through what is known in the industry as the "public utility model" of ambulance service.

The public utility model, as applied to Kansas City, provides, *inter alia,* for the designation of a single provider of all ambulance services. The provider responds to each ambulance call, whether emergency or non-emergency, with a fully equipped ambulance. A single provider is necessary for two reasons: (1) to prevent medical crises in which a supposedly routine, non-emergency transfer turns suddenly into a life-threatening event requiring sophisticated, advanced life support (ALS) capabilities lacking in many ambulances; and (2) to allow the public to offset the high cost of providing city-wide emergency service (which has extremely high fixed costs and a

meager fee collection rate) with revenues from lower-cost and much more profitable non-emergency transfer service. If there were more than one provider, non-emergency revenues would flow not to the public, but to the provider who ran predominantly non-emergency calls.

Under the model, a public entity which has political as well as medical accountability oversees the city's ambulance service; day to day *operation* of the service is delegated to a private ambulance company, called the operations contractor. The operations contractor, selected by an open competitive bid process, is paid a flat fee for its services, and penalized for slow response times or poor medical care. The public entity handles billings and collections.[2]

The City of Kansas City adopted and implemented major components of the public utility model in 1979, in response to major problems with the ambulance system in place at that time. The record shows that the City had provided emergency ambulance service, through the Kansas City General Hospital and, later, the Fire Department, for many years. In the early 1970's the City contracted with five private ambulance companies operating through a central dispatch center for the provision of emergency service. After two serious accidents in 1978 brought to the public's attention the problem of slow response times by these private ambulance companies, the City undertook a year-long study that culminated in the

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2. Here, MAST is the public entity which oversees the ambulance service. MAST is accountable both to the City, which subsidizes its operations, and to the Emergency Physicians Advisory Board (EPAB), which reviews the clinical quality of ambulance care. MAST contracted in 1981 for ASI to provide the day to day operation of the System. Following a public bid in 1982, there is a new operations contractor, under a contract which runs until July 1985.

adoption of the public utility model. That study included a visit to Tulsa, Oklahoma, where the model was in place and first observed. Jack Stout, the architect of the model, and his company, Fourth Party, Inc., were hired to design and implement the model in Kansas City. The City then created MAST and contracted with ASI. Because only ASI possessed both the necessary state ambulance license,[3] sufficient equipment and manpower to serve the entire Kansas City population, ASI was chosen as the initial operations contractor for the system.

Obviously, petitioners are unhappy with the system as adopted, because the model prevents petitioners from operating their non-emergency ambulances within Kansas City, except in certain cases. Petitioners are private, for-profit businesses, who spurn the expensive and unprofitable emergency work in favor of profitable non-emergency transfers. In the industry, this is called "skimming the cream."

All of the City's actions (and those of its agents, MAST, Stout and Fourth Party, Inc.) were taken pursuant to authority granted by the Missouri State Legislature. R. S. Mo. § 67.300 (1978) provides that:

> 1. *Any city,* town or village *may provide a general ambulance service* for the purpose of transporting sick or injured persons to a hospital, clinic, sanitorium or other place for treatment of the illness or injury, and for that purpose *may*
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> * * * *

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3. R. S. Mo. § 190.100 et seq. (1978) requires *all* ambulance services operating within the State of Missouri to be licensed by the State. These licenses are renewed yearly, but only after the State Bureau of Emergency Medical Services has certified the "public need and necessity" for the ambulance service.

> 2. *Contract with one or more individuals,* counties, associations *or other organizations for the operation,* maintenance and repair of any such vehicles and *for the furnishing of emergency treatment,* . . . (Emphasis added).

In addition, Chapter 190 of the Missouri Statutes contains a comprehensive anticompetitive regulatory scheme governing *all* ambulance service within the state. The licensing law, R. S. Mo. § 190.100 et seq. (1978), requires that all ambulance vehicles and operators be licensed by the State; mandates minimum equipment and insurance coverage; provides for detailed record keeping by all ambulance operators; and requires an annual determination that "public need and necessity require the proposed ambulance services," R. S. Mo. § 190.125. In accordance with the powers granted to cities by R. S. Mo. § 67.300, cities are free under the licensing law to impose additional restrictions on ambulance operators, through "any law, ordinance or regulation not in conflict with this statute," R. S. Mo. § 190.105(5). The Missouri Supreme Court has held, in *City of Raytown v. Danforth,* 560 S.W.2d 846, 859 (Mo. banc 1977), that the thrust of the licensing law is "toward control of destructive competition and improvement of [ambulance] service."

The City and MAST seek no more than the opportunity to provide the best quality care to their citizens at a reasonable cost to the public treasury. Petitioners, by contrast, are motivated by profit, not the public interest. Petitioners are trying to distort the federal antitrust laws into a weapon which would force Kansas City to abandon the public interest and return to unrestrained competition in the field, with poor response times, unnecessary deaths and high tax subsidies. These efforts should be rebuffed.

REASONS WHY THE WRIT SHOULD BE DENIED

I. There Is No Question Of General Importance Meriting Review By This Court Presented In This Case.

A. This Case Involves Only the Application of Well-Established Precedent to Specific Missouri Statutes and Case Law, and a Decision by This Court Would Have Little Impact Elsewhere.

While the outcome of this case is of vital importance to MAST and the people of Kansas City, this case has no real importance outside the state of Missouri. As petitioners admit and as the Eighth Circuit found, the outcome of this case turns on whether the language and intent of two Missouri statutes, R. S. Mo. § 67.300 and R. S. Mo. § 190.100 et seq., provide sufficient legislative authorization to bestow upon respondents immunity under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978), and *Community Communications, Inc. v. City of Boulder*, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982). Because this case involves only Missouri law, with no application in other states, a decision here would have little precedential value.

This case is, therefore, quite unlike *City of Boulder, supra*, which clearly had national importance. In *Boulder*, this Court considered whether a city's "home rule" status, by itself, was sufficient to place that city's actions under *Parker v. Brown*. Here, the issue is whether *two specific Missouri statutes* create sufficient "state action" to im-

munize respondents' actions taken under authority granted by those statutes. A decision by this Court would not decide issues of national scope.[4] Instead, a decision here would merely unleash a flood of requests by litigants all over the United States seeking this Court's advice as to whether particular zoning laws, land use statutes, sewage disposal ordinances, taxicab regulations, and innumerable other examples of municipal regulation of commerce constitute "state action." *See generally* P. Areeda, *Antitrust Law*, §212.3b (1982 Supp.).

The Eighth Circuit in this case neither deviated from nor expanded any doctrines of this Court. Rather, the Eighth Circuit simply applied the rules laid down in *Parker, City of Lafayette* and *City of Boulder, supra.* Because Kansas City's actions are not per se "the action of the State of Missouri itself in its sovereign capacity" (App. at A14), the Eighth Circuit analyzed the City's actions under the rules laid down by this Court:

> An expression of state policy that is sufficient to establish *Parker* immunity is comprised of two elements: The legislature must have authorized the challenged activity, and it must have done so with an intent to displace competition. *See* Areeda, Antitrust Law § 212.3a, at 53 (1983 Supp.). *See also Community Communications Co. v. City of Boulder, supra*, 455 U.S. at 51-52, 102 S. Ct. at 840-841; *City of Lafayette v. Louisiana Power & Light Co., supra*, 435 U.S. at 415, 98 S. Ct. at 1138.

The Eighth Circuit applied these rules and determined that state action was present.

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4. Respondents are aware of only three other cities (Tulsa, Oklahoma; Little Rock, Arkansas; and Fort Wayne, Indiana) which have adopted all or substantial parts of the public utility model.

Petitioners do not challenge the legal standard applied by the Court of Appeals; petitioners seek review by this Court "because the Eighth Circuit's application of the 'affirmative expression and clear articulation' requirement is in error" (Petitioners' Petition at p. 13). This Court has more pressing matters at hand than deciding whether a lower court's interpretation of state statutes was erroneous. The writ should be denied.

B. The Eighth Circuit's Decision Gave Full Consideration to the Issues and Decided Them Correctly and in Harmony With All Relevant Decisions by This Court and the Courts of Appeals.

Petitioners have not attacked the Eighth Circuit's decision as being in conflict with any decisions of this Court, nor have petitioners alleged any conflict among the Circuits. Both sides agree that *City of Lafayette* and *City of Boulder* are the only cases decided by this Court which apply the state action exemption to municipal defendants. The Eighth Circuit's decision in this case is in complete harmony with those decisions.

As a plurality of this Court held in *City of Lafayette, supra,* 435 U.S. at 413, 98 S. Ct. at 1136, 55 L. Ed. 2d at 384, "the *Parker* doctrine exempts only anticompetitive conduct engaged in * * * by [municipalities], pursuant to state policy to displace competition with regulation or monopoly public service." Such a state policy may be found wherever "the state authorized or directed a given municipality to act at it did." *Id.,* 435 U.S. at 414, 98 S. Ct. at 1137, 55 L. Ed. 2d at 384. The city need not "point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust lawsuit," *Id.,* 435 U.S. at 415, 98 S. Ct. at 1138, 55 L. Ed. 2d at 385. It is

enough, the plurality held, that "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.*, 435 U.S. at 415, 98 S. Ct. at 1138, 55 L. Ed. 2d at 384; *accord: Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *application for certiorari pending*, No. 82-1832 (1983); P. Areeda, *Antitrust Law*, § 212.3 (1982 Supp.).

In *City of Boulder, supra*, this Court considered a municipality's claim to immunity by virtue of its "home rule" powers under Colorado law. The Court stated that the City's action could not be exempted from antitrust scrutiny "unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy," *Boulder, supra*, 455 U.S. at 42, 70 L. Ed. 2d at 819. The Court found no evidence of such a state policy in *Boulder*, and reversed.

In this case the Eighth Circuit correctly found state authorization for Kansas City's actions in R. S. Mo. § 67.300, the statute which authorizes cities to provide ambulance service, own or lease vehicles, and "contract with one or more" persons to operate the service (App. at A70-71). The Eighth Circuit found that Kansas City's actions are in accord with a *state* policy to replace competition with regulation or monopoly public service. Such a state policy is manifested not only in § 67.300, but also in R. S. Mo. § 190.100 et seq., the state ambulance licensing law. As noted above, the licensing law places "public need and necessity" at the focal point of the decision as to whether an ambulance service will be licensed. The Eighth Circuit properly relied on the Missouri Supreme Court's interpretation of the licensing law in *City of Raytown v. Danforth*, 560 S.W.2d 846, 849 (Mo. banc 1977). In *City of Raytown* the Missouri Supreme Court held that the "thrust of the Licensing Law" was "toward control of destructive

competition and improvement of service." With such a clear expression of state policy, the Eighth Circuit's decision was not only correct, but unavoidable.

There is no conflict between the Eighth Circuit's decision and any other decision, whether of this Court or any Court of Appeals. Indeed, in the only other Circuit Court decision dealing with analogous facts, *Town of Hallie v. City of Eau Claire,* 700 F.2d 376 (7th Cir. 1983), *application for certiorari pending,* No. 82-1832 (1983), the Seventh Circuit held squarely in accord with the Eighth Circuit's decision in this case.

In *Town of Hallie,* plaintiffs were outlying towns to whom the City of Eau Claire, Wisconsin had refused to supply sewage treatment services unless the towns agreed to be annexed. The towns complained that they were prevented from competing in the market for sewage collection and transportation, and that such foreclosure violated the Sherman Act. The Seventh Circuit agreed with the District Court that Wisconsin statutes gave Eau Claire the authority to act as it had, and evinced a state policy to allow Eau Claire to restrict sewage treatment services to its city boundaries, or to require annexation as a precondition for the receipt of such services. *Id.,* 700 F.2d at 382-83. The dismissal of the plaintiffs' Complaint was, therefore, affirmed.

Town of Hallie, like this case, involved the application of well-established rules of law to a particular set of facts and state statutes. There is no inconsistency between the decision of the Seventh Circuit in *Town of Hallie* and that of the Eighth Circuit here. Again, there is simply no reason for this Court to review this case.[5]

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5. Petitioners' suggestion that this Court should combine *Town of Hallie* with this case for consideration is without merit.

(Continued on following page)

II. There Is No Reason For This Court To Accept Review Of This Case To Determine Whether The "Active State Supervision" Language In Midcal Should Apply To Municipal Defendants Under Parker.

A. The Eighth Circuit Was Correct in Determining That There Is No Need for Active State Supervision in This Case, and This Court Need Not Review That Determination.

The Eighth Circuit agreed with the Seventh Circuit's decision in *Town of Hallie* that the State need not "actively supervise" the City's anticompetitive system so long as the expression of state policy is sufficiently clear and the City is carrying out a governmental function designed to protect public health and safety. *Gold Cross,* 705 F.2d at 1014 n. 13 (App. A at A20); *Town of Hallie, supra,* 700 F.2d at 383-84 and n. 18. As both Circuit Courts, three Justices of this Court, and at least two commentators have noted, there are a number of good reasons why the "active state supervision" language of *California Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 104-06, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980), should not apply to the City and its agents in this case.

Footnote continued—

The two cases, although identical in result, are substantially different factually, and need not have been decided in the same way. The Wisconsin statutes considered in *Town of Hallie* were *far less clear* in evincing state authorization to restrict services than the Missouri statutes presented here. The Seventh Circuit's decision was based on its finding that the Wisconsin statutes authorized a city to set limits on the reach of its public services. From this, the Seventh Circuit inferred a state policy to allow cities to condition such services on annexation. *Id.,* 700 F.2d at 382-83. In this case, one Missouri statute, R. S. Mo. § 67.300, *specifically authorizes* a sole-provider ambulance service; no inferences are required. *Gold Cross,* 705 F.2d at 1013; App. A at A17.

Nothing in *Parker v. Brown*, *City of Lafayette*, or *City of Boulder* mentions "active state supervision" as a prerequisite for state action immunity. The Eighth Circuit here correctly noted that state supervision was required of the *private* defendants in *Midcal* "to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake." *Gold Cross*, *supra*, 705 F.2d at 1014; App. A at A20; *see also Town of Hallie*, *supra*, 700 F.2d at 384. Because of the political and medical accountability inherent in Kansas City's system, *see* fn. 2, *supra*, the "potential for abuse" is simply not present in this instance.

The question decided by the Eighth and Seventh Circuits here and in *Town of Hallie* was expressly reserved by this Court in *City of Boulder*, *supra*, 455 U.S. at 51-52 n. 14, 70 L. Ed. 2d at 819 n. 14. However, the Chief Justice and Justices Rehnquist and O'Connor, dissenting in *City of Boulder*, noted that "it would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself," *Id.*, 455 U.S. at 71 n. 6, 70 L. Ed. 2d at 831. The "active supervision" prong of *Midcal*, they felt, had no application to municipal defendants acting pursuant to state policy.

Professor Areeda similarly writes that "active state supervision" is a requirement reasonably applied to *private* antitrust defendants, but unnecessary for *municipal* or *public entities* acting pursuant to an anticompetitive state policy. The real test for *Parker* immunity, Areeda holds, is whether the challenged conduct is "state action." Where there is a clearly anticompetitive state policy under which the city is operating, supervision is not required:

> Thus, requiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity.

Areeda, *Antitrust Law, supra,* § 212.2a (1982 Supp.) at 47 (footnote omitted); *see also* P. Areeda, *Antitrust Immunity for State Action After Lafayette,* 95 Harv. L. Rev. 435, 445 and n. 49 (1981); Rogers, *Municipal Antitrust Liability in a Federalist System,* 1980 Ariz. St. L. J. 305, 340-42 (1980).

State supervision of Kansas City's restraint imposed pursuant to state policy is unnecessary because of the *political* accountability inherent in this situation. The City of Kansas City and MAST are politically accountable to the local voters, as are the state legislators who authorized Kansas City's system. Should abuse become apparent, MAST and the city ambulance system can be further regulated or in fact swept away by the City Council. Should the City ignore any abuse, the state legislature could amend R. S. Mo. § 190.105 to require that cities permit *all* holders of state ambulance licenses to operate within the city.

Finally, both the Seventh and Eighth Circuits recognized that state supervision of local governmental decisions is unwise. The Eighth Circuit in this case noted that "to require the state to supervise Kansas City's ambulance system . . . makes little sense." *Gold Cross,* 705 F.2d at 1014, App. A at A21. The Eighth Circuit echoed the concerns expressed by the Seventh Circuit in *Town of Hallie,* 700 F.2d at 384, that requiring state supervision over local governmental activities would unnecessarily burden limited state resources and would encourage "duplicative, wasteful regulation and could erode the local autonomy

that the state has sought to encourage." *Gold Cross,* 705 F.2d at 1015, App. A at A22; *Town of Hallie,* 700 F.2d at 384. The Seventh Circuit also hesitated to impose a standard that would require courts to decide how "active" state supervision must be in order to pass muster, 700 F.2d at 384.

Each of these concerns is legitimate and compelling, and each demonstrates the lack of merit in petitioners' position. Petitioners argue that the absence of state supervision will allow cities to implement their own policies without regard to the effects of such policies on neighboring political subdivisions (Petition at 19). The answer, of course, is that such can happen *only if* that result is contemplated by the state legislature and is, in fact, *state policy.* If the legislature has expressed a policy that each local government is authorized to restrict competition in furtherance of a governmental function[6] and may do so without regard to its neighbors, then such is in fact a *state* policy, not a reflection of "local parochial interests." The Court of Appeals' decision on this issue was correct, and review would be futile.

B. Because the District Court in This Case Found That There Is Sufficient Active State Supervision, and the Court of Appeals Held Such Finding Not Clearly Erroneous, This Is Not the Proper Case for This Court to Review the Application of Midcal to Municipal Defendants.

Should this Court wish to decide the question left open in *City of Boulder* concerning the necessity of state supervision of local governmental actions, nonetheless this would

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6. The Eighth Circuit clearly restricted its holding to this case involving a "traditional governmental function to protect public health and safety," 705 F.2d at 1014 n. 13, App. A at A20.

not b the appropriate case for such a determination. The Eighth Circuit's decision noted that while the District Court did not *need* to apply "active state supervision" to the actions at issue, the District Court nevertheless did so (App. B, A50-52). The District Court noted the regulatory interplay between R. S. Mo. § 67.300 and R. S. Mo. § 190.100 et seq., the clearly governmental nature of Kansas City's actions, and the strict oversight of MAST by the City Director of Health and the Emergency Physicians Advisory Board (App. B at A51-52), and held that there was sufficient state supervision to satisfy the second prong *Midcal*. The Eighth Circuit held that the District Court's finding on this issue was not clearly erroneous, *Gold Cross,* 705 F.2d at 1015 n. 15; App. A at A22.

Because there is a finding of active state supervision in this case, a decision by this Court holding whether such supervision is necessary would not alter the outcome of this case, and would therefore be no more than an advisory opinion. This Court normally refuses to render such advisory opinions, *cf. Bell v. Maryland,* 378 U.S. 226, 237, 12 L. Ed. 2d 822, 830, 84 S. Ct. 1814 (1964); *Preisser v. Newkirk,* 422 U.S. 395, 402-03, 45 L. Ed. 2d 272, 278, 95 S. Ct. 2330 (1975); *New Jersey v. Portash,* 440 U.S. 450, 465-68, 59 L. Ed. 2d 501, 514-15, 99 S. Ct. 1292 (1979) (Blackmun, J., dissenting); *Wilson v. Cook,* 327 U.S. 474, 490, 90 L. Ed. 793, 805 (1946) (Rutledge, J., dissenting), and need not render one in this instance.

CONCLUSION

Petitioners ask that this Court do no more than review the Eighth Circuit's application of a well-established rule of law to a particular and insular set of facts, and further ask for an advisory opinion on an issue of law that has been correctly decided (although it need not have been) by the District Court and the Court of Appeals. None of the criteria upon which this Court usually accepts certiorari are present. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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